

It was undisputed claimant suffered a work-related accident but the parties were unable to agree on the nature and extent of disability, if any, caused by the accident. The claimant's medical expert, Dr. Michael Poppa, opined claimant suffered an 18 percent whole person impairment. The respondent's medical expert, Dr. Christopher Fevurly, opined claimant suffered a temporary aggravation of his preexisting low back condition but did not suffer any additional permanent impairment. The court ordered independent medical examiner, Dr. Edward Prostic, opined claimant suffered a 10 percent whole person impairment as a result of his accidental injury at work for respondent.

The Administrative Law Judge (ALJ) awarded claimant compensation for a 10 percent whole person functional impairment.

Respondent requests review of the nature and extent of claimant's disability and whether the ALJ erred in considering Dr. Prostic's rating report which failed to state that his rating was based on the *AMA Guides*, Fourth Edition. In the alternative, respondent argues that its medical expert's opinion was based upon a comparison of claimant's objective medical records both before and after claimant's current injury and consequently is more persuasive than the other doctors' opinions.

Claimant argues that his work injury aggravated his preexisting condition which resulted in an additional 10 percent functional impairment from the injury. Consequently, claimant argues the ALJ's Award should be affirmed.

Because claimant returned to work for wages equal to or more than his average gross weekly wage at the time of his injury, the sole issue for Board determination is the nature and extent of his functional impairment, if any.¹

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

David Gladson has worked as a grill cook approximately nine years for respondent. His job includes using fire wood to cook. On July 5, 2009, claimant was bending over to pick up some fire wood when a co-worker opened a door knocking claimant into a wood pile. Claimant testified that his back started getting sore the next day and then it gradually worsened day by day.

Claimant suffered a similar event or accident on two different occasions in the following days. He advised the manager each time it happened. Respondent referred claimant to Concentra for medical treatment. The doctor prescribed some pain medication, muscle relaxers and anti-inflammatory medication as well as physical therapy. X-rays and an MRI were performed. The MRI revealed a broad based left lateral disc protrusion at L5-S1 with hypertrophy at that level. Claimant was referred to Dr. Harold Hess.

Dr. Hess examined and evaluated claimant. The doctor referred claimant to Dr. Howard Aks for steroid injections. Dr. Aks took claimant off work in October 2009 for approximately two months. The steroid injections initially gave claimant some relief.

¹ See K.S.A. 44-510e(a).

Claimant has not received any medical treatment for his back and left leg after December 2009. After being released by Dr. Aks, claimant returned to work for respondent.

Claimant testified he had prior back problems (L5-S1) in 1991 or 1992 for which he received steroid injections. He further testified that after the treatment his problems were alleviated. Restrictions were placed on claimant of no lifting greater than 25 pounds and no repetitive bending. Then in 2002 he was again treated with steroid injections for a herniated disc at L4-5 which again resolved his back complaints. Claimant testified that he was not having any problems with his back between 2002 and the accidental injury on July 5, 2009.

At claimant's attorney's request, Dr. Michael Poppa, a board certified independent medical examiner and medical review officer, examined and evaluated claimant on January 14, 2010. Upon physical examination, the doctor found straight leg raising produced lower back pain with production of tightness and pain in his left lower extremity thigh and calf, pain on palpation overlying his lumbar paraspinals with increased muscle tension and noted claimant ambulated with a slight antalgic gait. At the time of his examination, Dr. Poppa opined claimant was at maximum medical improvement and the medical treatment received was appropriate for his work-related injury. The doctor recommended that claimant continue his home exercise program for strengthening and range of motion. However, if claimant's lower extremity symptoms increase, then he would be a surgical candidate for a discectomy at L5-S1 and should be referred to a neurosurgeon. Dr. Poppa placed restrictions on claimant of no lifting greater than 25 pounds on an occasional basis and no overtime work but also to continue to observe his previous work restrictions imposed before the instant accidental injury.

Based on the *AMA Guides*, Dr. Poppa opined claimant had a 10 percent whole person impairment due to his lumbar spine with disc herniation and left lower extremity radiculopathy. This placed claimant in the DRE Category III. An additional 5 percent whole person impairment was provided by Dr. Poppa for claimant's lumbar spine due to chronic musculoligamentous sprain-strain secondary to his work contusion. The doctor assigned a 10 percent impairment to claimant's right lower extremity for foot and ankle pain secondary to his antalgic gait which converts to a 4 percent whole person impairment. Using the Combined Values Chart, Dr. Poppa determined the impairment ratings combine for an 18 percent whole person functional impairment.

On cross-examination, Dr. Poppa testified:

Q. You didn't make any effort to -- to deduct any preexisting medical impairment from him, did you?

A. No. Because I believe the current ratings are applicable to his most recent injury and do not -- are not a portion to reflect any previous impairment.

Q. But you indicated he'd had at least two prior herniated discs based upon his history?

A. Correct.

Q. You didn't have any medical records to review to determine whether or not he had any preexisting disability, did you?

A. No.²

Dr. Chris Fevurly examined and evaluated claimant on April 22, 2010, at respondent's attorney's request. The doctor reviewed the medical records and diagnostic films provided which included an October 23, 2002 MRI of the lumbar spine; August 26, 2009 MRI of the lumbar spine; and the July 4, 2003 routine x-rays of the feet. Upon physical examination, Dr. Fevurly found claimant had mild to moderate tenderness over the lumbar spine and pain in the low back at the extreme ranges of all motion. The doctor diagnosed claimant as having had a blunt trauma to the lumbar spine with a brief aggravation of his preexisting chronic low back pain with left leg radiculopathy. Dr. Fevurly further opined that claimant had reached maximum medical improvement and there was no need for additional diagnostic testing, consultations or therapeutic interventions due to his exacerbation of his chronic preexisting low back pain and intermittent left leg radiculopathy.

Based on the *AMA Guides*, Dr. Fevurly found no additional impairment with regard to claimant's low back because he had a preexisting Category III DRE Lumbosacral impairment since 1992 with disc herniation, low back pain and left leg lumbar radiculopathy. The doctor further opined that claimant's current lumbar spine condition is the same as it has been over the last 18 years. Permanent restrictions of no lifting greater than 25 pounds and avoidance of repetitive bending and stooping placed on claimant in 1992 should remain the same. Dr. Fevurly did not recommend any additional treatment for claimant's two-level lumbar disc disease.

A pre-hearing settlement conference was held on May 19, 2010. The parties were unable to agree on claimant's functional impairment and the ALJ entered an Order For Independent Examination which provided in pertinent part:

Edward J. Prostic, M.D., is selected to examine the above named claimant and report his rating, restrictions and any pre-existing regarding the present apparent functional impairment of the claimant to the undersigned Administrative

² Poppa Depo. at 36-37.

Law Judge, **all pursuant to K.S.A. 44-510e(a), referring to the A.M.A. Guides to the Evaluation of Permanent Impairment, Fourth Edition.**³ (Emphasis Added)

On June 1, 2010, Dr. Prostic took a history from claimant and performed a physical examination. Claimant reported that before the 2009 accidents he no longer was having significant difficulties with his low back. But he now has a stabbing feeling in his left buttock when he arises in the morning. His pain is predominately on the left side below the waist into the proximal left posterior calf. His back pain worsens with standing, walking, bending, twisting and pulling.

The doctor performed a physical examination and found claimant slowly reached to mid calf level in forward flexion. He was able to walk on his toes and heels, leg lengths were symmetrical with no calf atrophy or weakness in either leg. Claimant had mild hamstring tightness bilaterally with decreased sensation in the left anterolateral calf more than the lateral foot. Reflexes were symmetrical but hypoactive. Dr. Prostic reviewed the claimant's MRI studies of October 23, 2002, and August 26, 2009, which he noted both revealed protrusion of disc at L5-S1, asymmetric to the left. The doctor then concluded his report in the following fashion:

On or about July 5, 2009, David E. Gladson sustained injury to his low back during the course of his employment. He has aggravated pre-existing disease at L5-S1 where he has lateral recess stenosis. If symptoms worsen, surgery is possible. Permanent partial impairment is rated at 10% of the body as a whole on a functional basis. No work restrictions are required at this time.⁴

Because claimant returned to work for wages equal to or more than his average gross weekly wage at the time of his injury, he is limited to an award based upon the percentage of his functional impairment.⁵ Functional impairment is defined by K.S.A. 44-510e(a) as follows:

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

Respondent argues that the ALJ should not have considered Dr. Prostic's rating because his report did not note his opinion was based on the *AMA Guides*, Fourth Edition.

³ Order For IME (May 19, 2010) at 1.

⁴ Prostic's Medical Report (Jun.1, 2010) at 2.

⁵ K.S.A. 44-510e(a).

At the ALJ's direction, claimant was evaluated by Dr. Prostic for an independent medical examination on June 1, 2010. Dr. Prostic's report does not, on its face, indicate that his impairment rating was prepared in a manner consistent with the *AMA Guides*, Fourth Edition. However, it is clear that the ALJ's Order For Independent Examination to Dr. Prostic was for a rating based upon the *AMA Guides*, Fourth Edition.

Although the respondent contends the ALJ erred in relying upon Dr. Prostic's opinions because they are not based upon the *AMA Guides*, the Board disagrees. The ALJ sent Dr. Prostic an Order for an examination and a request for him to render an opinion based upon the *AMA Guides*, Fourth Edition and he complied, providing a written report to the ALJ and to the parties. While it is unfortunate that he did not specifically include a statement that indicates his opinions were based upon the *AMA Guides*, Fourth Edition, the Board is not prepared to believe that he disregarded the contents of the ALJ's Order. Dr. Prostic is well known to all involved in this case and there is simply no reason to believe that the difference in the opinions expressed by Drs. Prostic, Poppa and Fevurly are anything more than that, a professional difference in opinion. Accordingly, the Board affirms the ALJ's Award.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Marcia Yates Roberts dated December 21, 2010, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Matthew R. Bergmann, Attorney for Claimant
Kip A. Kubin, Attorney for Respondent and its Insurance Carrier
Marcia Yates Roberts, Administrative Law Judge